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In the Supreme Court of the United States

THE STATE OF KANSAS,
Complainant,

vs.

THE STATE OF COLORADO,
ET AL.,
Defendants.

No. 8 ORIGINAL.

REPLY BRIEF OF COUNSEL ON MOTION OF CERTAIN DEFENDANTS HEREIN TO DISMISS THE BILL OF COMPLAINT.

8 Orig'l.
T. 1906

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THE SMITH-BROOKS PTG. CO., DENVER.

In the Supreme Court of the United States.

THE STATE OF KANSAS,
Complainant,
vs.
THE STATE OF COLORADO,
ET AL.,
Defendants.

No. 7 ORIGINAL.

REPLY BRIEF OF COUNSEL ON MOTION OF CERTAIN DEFENDANTS HEREIN TO DISMISS THE BILL OF COMPLAINT.

The brevity of the argument of the counsel for Kansas does not deprive it of notable features.

In the first place, it is to be observed that it does not combat our contention that if the common law prevails, the relative rights of the riparian owners in Kansas and these defendants, can not be determined without making said riparian owners parties. In view of the claim heretofore so sedulously made by Kansas that the common law is the repository of the rules which should determine this controversy, the failure to make an adverse comment upon our position, even *en passant*, would seem to be tantamount to a confession of its correctness. That the desire now is to avoid the consequences of this original claim

in connection with the ascertainment of necessary parties is apparent.

A proposition is now advanced as a controlling one, the boldness of which is only equaled by the vagueness of the principles upon which it is bottomed. It is said that:

> "If every riparian land owner in Kansas were to waive, relinquish or convey his riparian rights to the defendants, the state of Kansas might still maintain this bill and have the relief sought for the benefit of its own citizens, for its own benefit as a riparian land owner and as the owner of the bed of the river, unaffected by any relinquishment or release made by any or all of the riparian land owners."

If counsel have faith in the proposition and have not fired in the air with the hope of reaching unseen game, they should have demurred to our special defenses which counted upon the loss by all the riparian owners in Kansas of their common law riparian rights. They should not have taken issue upon immaterial matter. These defendants do not have the financial resources of the state of Kansas or the state of Colorado, and it is inequitable to burden them with the expense of maintaining a false issue when, by so simple a device as a demurrer, it could be avoided. However, the advancement of the proposition must, in the determination of the inquiry as to who are necessary parties, operate as a demurrer.

If the court finds the proposition well founded, it may deny our motion and thus, in effect, decree that

there is no issue involving an adjudication of the relative rights of the riparian owners in Kansas and these defendants, as appropriators in Colorado. If, however, the court should be in doubt, or should be disposed to think that upon the face of the pleadings, these rights must be determined, then the reasons advanced by us in our opening argument, being uncontroverted and, as we think, uncontrovertible, should prevail, and the case, as to these defendants, should be disposed of accordingly.

It will be observed upon reading our former argument, that we forecasted this position as the only one by which Kansas could hope to escape a recognition of the riparian owners in Kansas as necessary parties. We then stated our inability to find, in the law, any support for such contention. Although Kansas has moved in and now occupies the position thus suggested, we are not made a whit wiser by reason of the citation of precedent, authority or principle, either in the law of nations, the common law, or in any other source of law to which, as we have heretofore been told by this court, we may go in the settlement of similar controversies.

The claim that a state has a juridical interest in its non-navigable streams, separate and apart from and superior to that of the riparian proprietor, rests on such cloudy and intangible premises that we are at a loss for a method of defense. We can think of nothing which promises so much as a contemplation of its logical results. If the proposition be sound, the riparian owner in Kansas can not, by waiver, relinquishment or conveyance, part with the accustomed flow of a stream over his land, and no more can an

appropriator for irrigation, relying upon such waiver, relinquishment, or conveyance in his behalf, divert or diminish the same.

Now, it is finally admitted by counsel in their argument that the statutes of Kansas do authorize the appropriation and diversion of water, provided compensation is made. Thus, under legislative sanction, "the continuance of the accustomed flow of the river for the benefit of all the citizens of the state" may be lost, the riparian lands of the state may be rendered less fertile and productive, their taxable value may be reduced, and the healthfulness of the state, so far as it is promoted by exhalations from the river, may be impaired.

We may well inquire whether the state "in its public capacity as a sovereign, as a guardian and trustee for a large body of its citizens," can be concluded by any act of its legislature which is so destructive of the incidents of its sovereignty. But it may be said that Kansas, through its legislature, may waive its sovereign rights, may submit to lessened revenue, may imperil the health of some of its citizens in favor of the welfare of others of its citizens. Very well! The case then is as follows:

Kansas appeals to the Supreme Court of the United States to restrain these defendants from diverting the water of the Arkansas river in Colorado, upon the ground that it is entitled "to a continuance of the accustomed flow of the river for the benefit of all its citizens, and to prevent a reduction of the taxable value of the lands riparian to said river and to secure its healthful vapors." In answer, we point to its own statutes and to its own policy in respect to

the use of the waters of said river and make it manifest, by its own admissions, that the moment the river crosses the state line, every drop of its water, by the legitimate and natural operation of its statutes and policy, may be diverted and that its course through the state may be marked only by a dry, waterless bed.

It is the sovereign right of the state of Kansas, represented and expressed by this history and this policy, that the Supreme Court of the United States is asked to enforce. We would have been much pleased if the proposition had been elaborated by a statement of whether relief is asked in this case for the purpose of securing a continuous flow throughout the entire length of the Arkansas river in Kansas, or whether it is for the purpose, the moment the water passes into Kansas, of enabling that state to do with it as it likes.

Mr. Ware, in his elaborate exposition of the American Jus Gentium, says:

> "It seems to me that there exists an American Jus Gentium as between the states, *based upon the common law, as just and fair as the common law,* and as rigid in its requirements."

This view scarcely tallies with the view now taken by Kansas.

Let us consider another effect of the Kansas proposition. Suppose that all the riparian owners in Kansas should file "bills in equity for damages" (?) against these defendants, and thereby become paid or satisfied for the impairment or loss of the flow of water

over their land, would not these defendants, by all known rules of law or equity, be entitled to continue their diversion? Counsel for Kansas seem to think that such proceedings might be taken and such results produced. But if Kansas is paramount in respect to the flow of water, and the riparian owner can not waive, relinquish or convey any right to impair or diminish the same, how can the riparian owner claim damages for that which he can not part with?

By the theory of Kansas, the riparian owner, with respect to the state, is in a position analogous to that of a tenant to his landlord. He might recover for casual interruptions of his use, but the right inhering in the fee title could not be affected. However, it would seem that, by a bill in equity (?) filed in the Circuit Court of the United States for the District of Colorado, the riparian owner might be compensated in damages for his loss of water, and that thereafter the state of Kansas might file its bill in the Supreme Court of the United States and restore the water to him. Concerning this, as an illustration of the application of the American Jus Gentium, Mr. Ware is silent.

We further observe in the statement of proposition, that it is no longer necessary that a state should act upon behalf of *all* its people. If the riparian owners had waived, relinquished or conveyed their riparian rights to these defendants, then it appears that "the state of Kansas might still maintain this bill and have the relief sought for the benefit of *its other citizens.*" As we have alleged, and are prepared to prove, that the riparian owners have, by operation of law, lost or parted with their riparian

rights in favor of these defendants, and as the argument of counsel proceeds upon the theory that it may safely be conceded, it obviously follows that this case may, if necessary, be waged "for the benefit of its other citizens." We recognize the fact, of course, that in this particular counsel may not have meant just what they said.

In certain particulars, our opening brief appears not to have been understood. We do not contend that for the purpose of determining who are necessary parties, the answer is to be taken as true, any more than that the complaint is. Our position is, that, from the allegations of the pleadings, the controversy is to be ascertained, and that the controversy and the relief appropriate thereto determine who are necessary parties.

The statement of our first contention, as set forth on page 2 of the argument, is also faulty. Instead of concluding with the words "which the individuals themselves could not of course assert against the state of Colorado," it should have concluded with the words "which the individuals themselves could assert against these defendants."

If Kansas is correct in its view of its sovereign right over the Arkansas river, we fail to see any object in taking testimony. The defense interposed by these defendants, if true, can not defeat the right of Kansas to the continual flow of the river as it formerly flowed. The state of Colorado, for which, however, we do not appear in this connection, would appear to be void of any defense, and the government of the United States must find its ability to develop the irrigation possibilities of the Arkansas river, unless

confined to the state of Kansas, more hopeless than it appeared when it filed its petition in intervention. That petition proceeded upon the theory that the obstacle to overcome was the common law right of the riparian proprietors. It will now find that it is the sovereign right of the state of Kansas to have all the waters of the Arkansas river flow over the bed of said river throughout its entire course, that stands in its way.

In conclusion, we think it fair to say that if the Kansas proposition is not well founded, counsel for Kansas must, if they defeat this motion, be helped out by this court's investigation of the law, rather than by their own.

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In the Supreme Court of the United States.

Office Supreme Court U. S.
FILED
OCT 10 1905
JAMES H. McKENNEY,
Clerk.

THE STATE OF KANSAS,
Complainant,
vs.
THE STATE OF COLORADO, THE ARKANSAS VALLEY SUGAR BEET AND IRRIGATED LAND COMPANY, THE GRAHAM DITCH COMPANY, THE COLORADO FUEL AND IRON COMPANY, THE FORT LYON CANAL COMPANY, THE ROCKY FORD CANAL, RESERVOIR, LAND, LOAN AND TRUST COMPANY, THE CATLIN CONSOLIDATED CANAL COMPANY, THE OXFORD FARMERS DITCH COMPANY AND THE LAKE CANAL COMPANY,
Defendants.

Original Proceeding.

No. 3 Orig.

3 Orig'l.
C. T. 1906

IN THE MATTER OF THE MOTION OF COMPLAINANT TO ADVANCE THE CASE UPON THE DOCKET.

OBJECTIONS OF DEFENDANTS TO SAID MOTION.

THE STATE OF COLORADO,
By NATHAN C. MILLER, Attorney General.

THE ARKANSAS VALLEY SUGAR BEET AND IRRIGATED LAND COMPANY,
By PLATT ROGERS,
JOHN SHAFROTH,
FRANK E. GREGG, Its Attorneys.

THE COLORADO FUEL AND IRON COMPANY,
By D. C. BEAMAN, Its Attorney.

THE FORT LYON CANAL COMPANY,
By CHARLES E. GAST, Its Attorney.

THE GRAHAM DITCH COMPANY,
By C. C. GOODALE, Its Attorney,

THE ROCKY FORD CANAL, RESERVOIR, LAND, LOAN AND TRUST COMPANY,
THE CATLIN CONSOLIDATED CANAL COMPANY,
THE OXFORD FARMERS DITCH COMPANY AND
THE LAKE CANAL COMPANY,
By F. A. SABIN, Their Attorney.

THE SMITH-BROOKS PRESS, DENVER

In the Supreme Court of the United States.

THE STATE OF KANSAS,
Complainant,
vs.
THE STATE OF COLORADO, THE ARKANSAS VALLEY SUGAR BEET AND IRRIGATED LAND COMPANY, THE GRAHAM DITCH COMPANY, THE COLORADO FUEL AND IRON COMPANY, THE FORT LYON CANAL COMPANY, THE ROCKY FORD CANAL, RESERVOIR, LAND, LOAN AND TRUST COMPANY, THE CATLIN CONSOLIDATED CANAL COMPANY, THE OXFORD FARMERS DITCH COMPANY AND THE LAKE CANAL COMPANY,
Defendants.

Original Proceeding.

No.

IN THE MATTER OF THE MOTION OF COMPLAINANT TO ADVANCE THE CASE UPON THE DOCKET.

The defendants above named, and each of them, respectfully state to the court, that the motion heretofore filed by the Hon. C. C. Coleman, attorney genera of the state of Kansas, moving the court to enter an order advancing the above entitled proceeding upon the docket of the court, and specifying the times within which briefs and written arguments should be filed, should not be considered or allowed for the following reasons:

First. The referee heretofore appointed to hear and report the testimony offered by the several parties

to said proceeding has not reported his proceedings to this court, nor caused to be filed the testimony taken before him.

Second. The abstract of the testimony, which it was heretofore stipulated might be made, has not been completed, nor filed, nor has any part of the same been printed.

Third. There is nothing in the nature of the case, in the proceedings heretofore had, nor in the testimony offered by any of the parties, nor in the situation of the parties respectively, requiring or making proper the advancement of said cause upon the docket of the court.

Defendants respectfully represent that until the testimony taken by the referee has been abstracted and printed, and the full and abstract testimony filed in this court, it will be impossible for their respective counsel to determine or advise the court as to the length of time that will be required to examine and properly consider the testimony and to prepare briefs and arguments having reference to the matters and things covered by said testimony and the questions of law contended for or associated herewith. And that this court may be advised as to the voluminous character of the testimony taken, the wide range of said testimony, and the consequent difficulty of stating the time within which briefs and arguments might be filed, defendants respecfully set forth the progress of said cause subsequent to the appointment of the referee to take testimony:

The State of Kansas commenced the giving of its testimony at Wichita, Kansas, on August 15, 1904,

continuing seven days, and examining thirty-two witnesses. Thereafter they continued the giving of testimony as follows:

At Arkansas City, Kas., 1 day, examning 15 witnesses.

At Kinsley, Kas., 1 day, examining 6 witnesses.

At Dodge City, Kas., 4 days, examining 10 witnesses.

At Pueblo, Colo., 2 days, examining 1 witness.

At Denver, Colo., 1 day, examining 2 witnesses.

At Garden City, Kas., 1 day, examining 16 witnesses.

At Denver, Colo., 3 days, examining 2 witnesses.

The total number of days occupied in giving testimony being 19 and the number of witnesses examined being 84.

The State of Colorado and the other defendants commenced the giving of their testimony at Denver, Colorado, on December 7, 1904, continuing 3 days and examining 27 witnesses. Thereafter they continued the taking of testimony as follows:

At Pueblo, Colo., commencing December 14, 1904, continuing 5 days and examining 29 witnesses.

At Colorado Springs, Colo., continuing 3 days, examin ng 6 witnesses.

At Denver, Colo., commencing January 10, 1905, continuing 3 days and examining 5 witnesses.

The United States, as intervenor, commenced giving its testimony at Santa Fe, N. M., on January 31, 1905, continuing 2 days and examining 6 witnesses. Thereafter it continued the giving of testimony as follows:

At Roswell, N. M., February 4, 1905, continuing 2 days, examining 8 witnesses.

At Washington, D. C., continuing 11 days, examining 19 witnesses.

At Little Rock, Ark., March 14, 1905, 1 day, examining 4 witnesses.

At Denver, Colo., March 20, 1905, continuing 5 days, examining 5 witnesses.

The total number of days occupied by the government in the giving of its testimony being 21, and the total number of witnesses examined being 42. Thereafter the State of Colorado and the other defendants resumed the giving of their testimony, commencing at Dodge City, Kas., May 5, 1905, 1 day, examining 6 witnesses.

At Larned, Kas., May 4, 1905, 1 day, examining 7 witnesses.

At Great Bend, Kas., May 5, continuing 2 days, examining 14 witnesses.

At Hutchinson, Kas., May 8, 1 day, examining 13 witnesses.

At Wichita, Kas., May 9, continuing 3 days, examining 17 witnesses.

At Winfield, Kas., May 12, 1 day, examining 14 witnesses.

At Denver, Colo., May 16, continuing 2 days, examining 1 witness.

The total number of days occupied by the State of Colorado and the other defendants being 25, and the total number of witnesses offered by them being 129.

The State of Kansas commenced the giving of its evidence in rebuttal at Garden City, Kas., May 31, 1905, 1 day, examining 8 witnesses.

At Dodge City, Kas., June 1, 1905, continuing 3 days, examining 10 witnesses.

At Larned, Kas., 1 day, examining 6 witnesses.

At Great Bend, Kas., 1 day, examining 7 witnesses.

At Sterling, Kas., June 7, 1 day, examining 4 witnesses.

At Hutchison, Kas., June 8, continuing 2 days, examining 8 witnesses.

At Wichita, Kas., June 10, continuing 3 days, examining 16 witnesses.

At Oxford, Kas., June 14, 1 day, examining 12 witnesses.

At Topeka, Kas., June 15, 2 days, examining 10 witnesses.

The total number of days occupied in giving rebuttal testimony being 15, and the total number of witnesses examined being 81.

The testimony offered by the State of Kansas in chief covers 2,943 typewritten pages.

The testimony offered by the State of Colorado and other defendants covers 4,027 typewritten pages

The testimony offered by the State of Kansas in rebuttal covers 1,521 typewritten pages.

The total number of typewritten pages of testimony being 8,491.

The total numbr of exhibits offered and on file being 115.

The taking of testimony was closed at Topeka, Kansas, on June 16, 1905. The abstracting of the testimony was commenced on July 11, 1905, and an adjournment was taken on August 9, 1905, and the abstracting was resumed on September 18, 1905. Of

the total number of typewritten pages of testimony (being 8,491) there has been abstracted up to the date of the preparation of this statement, namely September 28, 1905, 4,300 pages.

As will appear by the foregoing statement, the testimony has been taken with due diligence, and the abstracting of the same is proceeding as rapidly as circumstances will permit.

It is not desirable to file the testimony until the abstracting has been completed, as in the making of the abstract many errors are discovered which should be corrected before the testimony is filed. The completion of the abstract, and the printing of the same, will not be accomplished until long after the hearing of this motion. In the conduct of the case the State of Colorado, and the several individual defendants have caused certain portions of the work to be assigned to certain of their attorneys, attendance at the hearings and examination of witnesses being committed to some, and the examination of the testimony when completed, for the purpose of arranging and discussing the same and presenting the legal questions connected therewith, being committed to others. Until the testimony has been abstracted and printed, and placed in the hands of all the attorneys of these respondents, it will be impossible for them to confer to determine how much time will be required in discussing the many subjects covered by the testimony, or presenting the results of such testimony to this court in the complete and intelligible form required by the practice of the court, as well as by the importance of the controversy.

The motion is unaccompanied by any showing why the case should be taken up out of the usual or-

der. No claim is made that the State of Kansas, or any of its citizens, is suffering by reason of delay, nor is any claim made that any good purpose will be subserved by advancing the same. On the contrary, it will doubtless be admitted by counsel for the State of Kansas, and the testimony heretofore taken shows, that at no time since this action was instituted, has any part of Kansas, subject to cultivation, suffered for want of water, and that in no part of the Arkansas Valley have the owners of lands been injuriously or at all affected by the continued diversion of water in Colorado during the pending of this proceeding. It will also doubtless be admitted, and the testimony also shows, that the region, claimed by the bill of complaint, to be injuriously affected by the diversion of water in Colorado, has never been more productive, nor have the people been more prosperous than since the institution of this proceeding.

Upon the part of the State of Colorado it is respectfully submitted that the foundation of its existence as a developing and expanding community, is assailed by this proceeding, and that it should have all the time it may deem necessary for the full and complete preparation of the briefs and arguments in its behalf, and that in the absence of any showing why the rule should not prevail the respect due a sovereign state requires that it should not be subjected to unusual or unnecessary orders.

It is therefore respectfully submitted that this cause should take the usual course, and that the important questions of law and fact, presented by the record, should be patiently and carefully considered by the respective counsel, to the end that this honora-

ble court may have the benefit of their careful, well matured and unhurried views.

Respectfully submitted,

THE STATE OF COLORADO,
By NATHAN C. MILLER,
Attorney General.

THE ARKANSAS VALLEY SUGAR BEET AND IRRIGATED LAND COMPANY,
By PLATT ROGERS,
JOHN F. SHAFROTH,
FRANK E. GREGG,
Its Attorneys.

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